United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Original

75-1319

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1319

UNITED STATES OF AMERICA,

Appellant,

- against -

ESTELLE JACOBS, a/k/a
"Mrs. Kramer,"

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING EN BANC

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(Of Counsel).

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PRELIMINARY STATEMENT

The United States of America, by David G. Trager, United States Attorney for the Eastern District of New York, petitions for rehearing, or in the alternative, rehearing en banc, of the judgment entered on February 4, 1976, which affirmed the order of the district court suppressing certain perjured grand jury testimony of the defendant and dismissed Count Two (the perjury count) of the indictment.

The basis for the affirmance of the suppression order, and the dismissal of the perjury count because of the consequent lack of evidence to sustain it, did not rest, as did the district court's order, on a finding that the grand jury testimony was taken in violation of the Due Process Clause. On the contrary, without reaching the issue whether either the Due Process Clause or the Self-Incrimination Clause had been violated, the panel held that the grand jury testimony must be suppressed because the Organized Crime Strike Force Attorney failed to adhere to the policy followed by the United States Attorney of warning a potential defendant that he is a target of the investigation. Accordingly, Judge Gurfein observed that.

> "We thus have a situation in the Eastern District where if Estelle Jacobs had appeared before the Grand Jury on a subpoena issued by the United States Attorney she would have been warned that she was a target, while the Strike Force operating in the same district failed to give her such warning.
>
> In this posture of conflicting conceptions of prosecutorial fairness in the same district we need not consider whether there is a constitutional due process claim as the court below held. Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play. In <u>In re Persico</u>, 552 F.2d 41 (2 Cir. 1975), we upheld the right of Strike Force attorneys to appear before the Grand Jury partly because they were under the supervision of the United States Attorneys. We are sorry to learn that this

> may not always be the fact. We suggest that Strike Force attorneys should be instructed on and should adhere to the practices of the United States Attorney.
>
> In the interest of uniformity in criminal procedure within the Circuit, which is a fundamental of the administration of criminal justice, we affirm the dismissal of Count Two pursuant to our supervisory function."

REASONS FOR GRANTING THE PETITION

1. We believe that there are present here grounds justifying rehearing by the panel, as well as en banc consideration, if the petition directed to the panel is denied. The issue whether the grand jury testimony should be suppressed in exercise of the "supervisory power" was not raised by the defendant and, consequently, the United States did not have any opportunity to be heard on the issue and to argue, as we presently shall, that in the absence of a violation of the Constitution, an Act of Congress, or a rule formulated by the Supreme Court in exercise of its rulemaking authority, there is no "supervisory power" to justify the suppression of voluntary statements made by a defendant.

In McNabb v. United States, 318 U.S. 322 (1943), discussing the source of the Supreme Court's supervisory power, Mr. Justice Frankfurter observed that "[t]he function of formulating rules of evidence in areas not governed by

statute has always been one of the chief concerns of courts" (318 U.S. 341, n. 6 [emphasis supplied]). Moreover, he observed, that "in formulating such rules of evidence for federal criminal trials the court has been guided by considerations of justice not limited to strict cannons of evidentiary relevancy" (318 U.S. 341).

The area involving the admissibility of evidence generally, and incriminatory statements in particular, is now plainly governed by statute. And, we submit that whatever the law may have once been, the power to exclude a relevant self-incriminatory statement has been carefully circumscribed by statute.

First, Section 3501(a)of Title 18 provides that in any criminal prosecution, a confession, which is defined to include "any self-incriminating statement" (Section 3501(e)), "shall be admissible in evidence if it is voluntarily given" (Section 3501(a)). Absent a finding that the defendant's grand jury testimony was not voluntarily given, or that it was otherwise obtained in violation of the Constitution, neither this Court or the Supreme Court possess any "supervisory power" to suppress it. See United States v. Crook, 502 F.2d 1378, 1380-1381 (3rd Cir. 1974), certiorari denied, 419 U.S. 1123.

Second, an even broader restriction upon the supervisory power to exclude relevant evidence is contained in Rule 402 of the Federal Rules of Evidence (a rule which is, in fact, an Act of Congress [Pub. L. 93-595, January 2, 1975, 88 Stat. 1931]). Rule 402 expressly provides that:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

While the Notes of the Advisory Committee indicate that there was no intention to interfere with exclusionary rules intended to insure the "effective enforcement" of the Federal Rules of Criminal Procedure, there is clear evidence that Congress plainly intended to limit the exclusion of relevant evidence solely to those cases in which exclusion is required "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority" (emphasis supplied).

In explaining the reasons for the italicized language, the House Committee on the Judiciary observed (H.R. 93-650):

> "Rule 402 as submitted to the Congress contained the phrase 'or by other rules adopted by the Supreme Court'. To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read 'or by other rules prescribed by the Supreme Court pursuant to statutory authority' in this and other Rules where the reference appears."

If Congress did not intend to authorize the Supreme Court to formulate rules excluding otherwise relevant evidence, except pursuant to statutory authorization, it could hardly be that it intended to permit it to exercise unfettered supervisory power to achieve the same result. Moreover, the Supreme Court has itself observed that the federal judiciary does not sit to exercise a "chancellor's foot" veto "over law enforcement practices of which it d[oes] not approve." United States v. Russell, 411 U.S. 423, 435 (1973).

2. This issue aside, as a matter of policy, there is no justifiable reason to exclude the grand jury testimony because the Organized Crime Strike Force Attorney did not follow the same policy followed by the United States Attorney in the same district, particulary where, as here, there is no evidence that the failure to comply was deliberate. Here, the panel ignored altogether the thoughtful observations of Judge Friendly, in an opinion in which Judge Van Graafeiland

joined, in United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975). The issue there was whether an exclusionary rule should be applied because, contrary to stated Internal Revenue Service policy, the defendant was not given Miranda warnings even though at the time he was questioned he was allegedly suspected of criminal tax fraud. Although Judge Friendly ultimately concluded that the I.R.S. policy directive had not been violated, he indicated (for a unanimous panel), that, even if such a violation had taken place, an exclusionary rule would not necessarily be applied. In language which is plainly apposite here, he observed (524 F.2d 1089):

> ". . . It is, of course, well established that when agency action 'is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.' Vitarelli v. Seaton, 359 U.S. 535, 546-47, 79 S.Ct. 968, 976, 3 L.Ed.2d 1012(1959) (concurring opinion of Mr. Justice Frankfurter). However, Vitarelli and almost all of the great number of cases that have applied the doctrine have concerned the validity of the agency's own action in the face of a violation of its own regulations, see Note, Violations by Agencies of Their Own Regulations, 87 Harv.L.Rev. 629 (1974), rather than an invocation of the exclusionary rule. The latter, as Judge Clary said in a perceptive but seemingly neglected opinion many years ago, "represents an attempted accommodation of competing values." United States v. Schwartz, 176 F.Supp. 613, 615 (E.D. Pa. 1959), aff'd on other grounds, 283 F.2d 107 (3 Cir. 1960), cert. denied, 364 U.S. 942, 81 S.Ct. 461, 5 L.Ed.2d 373 (1961). Judge Clary thought that, while this accommodation required exclusion when the Constitution or a statute had been violated, the balance turned the other way

> when an official of an agency had simply violated the agency's own regulation--something which the agency would presumably be interested in correcting for the future, as it might not be when the Constitution or a statute imposed distasteful requirements upon it. Despite persuasive contrary arguments in Judge Coffin's opinion in United States v. Leahey, supra, a period of increasing disenchantment with the exclusionary rule, see Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 412-18, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971)(dissenting opinion of the Chief Justice); Schneckloth v. Bustamonte, 412 U.S. 218, 266-69, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (concurring opinion of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist); see also United States v. Burke, 517 F.2d 377, 386 (2 Cir. 1975), would not seem to be a good time for us to embrace a rule that when an agency voluntarily publishes a press release announcing that it will extend to suspects more procedural protection than the Constitution or a statute demands, any violation, however unintentional or excusable, will lead to suppression."

The holding of the panel here, suppressing the grand jury minutes for failure to comply with the policy of the United States Attorney as to warnings to be given grand jury witnesses, is plainly inconsistent with United States v. Leonard. There is no evidence here that the policy of the United States Attorney was deliberately disregarded. Indeed, because of the "omission" in the guidelines governing the operation of the Strike Force - to which panel opinion here referred (Slip Op. 2117, n.6), it is doubtful whether the Strike Force Attorney even knew that there was any such policy. Nor, is there any reason to believe, in light of the panel's admonition "that Strike Force Attorneys should be instructed on and should adhere to the practices of the United States Attorney" (Slip Op. 2117), that a judicially enforced exclusionary rule is necessary to enforce with that policy.

3. The holding of the panel here not only conflicts with Judge Friendly's analysis in United States v. Leonard, supra, on the efficacy of an exclusionary rule here, but it also conflicts with the well settled rule - enunciated in numerous opinions of the Supreme Court, and this Court, that whatever remedy a defendant who testified truthfully would be entitled to if the testimony he gave incriminated him, the procedures used to botain an otherwise voluntary statement do not afford a defense to a perjury indictment.

Particularly apposite here is United States v. Winter, 348 U.S. 204, 208 (2d Cir. 1965), certiorari denied, 382 U.S. 955. There a perjury conviction was affirmed despite the fact that, prior to giving his perjured testimony, the defendant was not apprised of his right to consult with counsel. It was held that even if the defendant were entitled as a matter of constitutional right to such advice, an omission to so advise him was not a defense to a charge that he thereafter perjured himself in the grand jury room (348 F.2d at 208).

Judge Weinfeld, writing for a unanimous panel observed (348 F.2d at 208-209):

> "It is one thing to say that testimony compelled from a grand jury witness who has been denied his right to counsel may be used to secure his indictment or conviction either for the crimes being investigated or for those revealed during the course of his testimony.

> Exclusion of such testimony does not preclude reindictment and prosecution on the basis of untainted evidence, thus affording an opportunity to vindicate the public interest. It is an entirely difference proposition, however, to say that such a witness may with absolute impunity proceed to perjure himself in the hope of avoiding the return of a True Bill. Such a rule would degrade the oath and have the effect of conferring permanent immunity on the perjurer."

Moreover, Judge Weinfeld continued (348 F.2d. at 209), quoting from United States v. Remmington, 208 F.2d. 567, 570 (2d. Cir. 1953), certiorari denied, 347 U.S. 913:

> "Here we have a separate crime of perjury committed after the illegal conduct by the government as opposed to the above cases [Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307 (1939), and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, 24 A.L.R. 1426 (1920)] where we had only a rule of evidence developed to prevent the government from making use of its illegally procured knowledge. It seems to us an unwarranted extension of that doctrine to apply it here to a new wrong committed by the defendant. Moreover, to call the perjury a fruit of the government's conduct here, is to assume that a defendant will perjure himself in his defense. *** If this assumption is a premise of the defendant's argument, we cannot accept it for it involves a disregard of the defendant's oath and an assumption that perjury, although a crime, is an inevitable occurrence in judicial proceedings. *** [S]upervisory rules *** do not permit the defendant to commit a new and

> independent crime. We do not preserve justice by allowing further criminal activity to take place."

Of course, the holdings of the Supreme Court sustain this approach. Thus, although it has been held that a witness may properly resist efforts to compel him to incriminate himself (see, e.g., Lefkowitz v. Turley, 414 U.S. 70, 78), and if he submits to such efforts, his incriminating statements may be excludable from future substantive use by the prosecution (id. at 79-80), he may not avoid compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them." Bryson, 396 U.S. 64, 72 (1969).

United States v. Knox, 396 U.S. 77 (1969) demonstrates the applicability of this proposition to the instant case. There, the defendant had been charged with making false statements in wagering tax forms required by a statute declared unconstitutional in Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968). The district court dismissed the indictment, reasoning that the defendant could not be prosecuted for failure to answer the wagering form truthfully because the Fifth Amendment privilege would have prevented his prosecution for failure to answer the form's questions in the first place.

While the Court agreed that the statute in question "injected an element of pressure into [the defendant's]

predicament at the time he filed the forms" (396 U.S. at 82), it held that the defendant's perjury was nevertheless not excusable on Fifth Amendment grounds. The Court reasoned that in making the false statements the defendant took "a course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take ***" (ibid.). Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "[W]hen [he] responded to the pressure under which he found himself by communicating false information, this was simply not testimonial compulsion" (ibid.). The same reasoning would apply even more forcefully to the instant case. If it is impermissible to lie to the government in the face of the degree of palpable, overt compulsion that confronted Knox, it is manifestly impermissible to answer falsely when, as here, the respondent has every reason to believe that the privilege is fully available. Indeed, the defendant was expressly warned prior to testifying that she could "refuse to answer any questions that you feel might tend to incriminate you" and that she had the right to consult with counsel of his choice who could be outside the grand jury room (Slip Opin. 2113).

In short, the holding of the panel cannot be reconciled either with the prior holdings in this Court in United States v. Winter, supra, or the long line of Supreme Court decisions.

CONCLUSION

Rule 35 of the Federal Rules of Appellate Procedure provides that petitions for rehearing en banc are not favored and that such rehearing ordinarily will not be ordered except"(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2)when the proceeding involves a question of exceptional importance". We respectfully submit that both these standards have been met here.

The scope of the supervisory powers of the federal judiciary to exclude relevant evidence, in light of recent statutory enactments, presents an issue of exceptional importance. More significantly, the holding here is inconsistent with the prior holdings of this Court. Accordingly, it is respectfully submitted that the petition for rehearing, or in the alternative, for rehearing en banc, be granted, that the judgment entered on February 24, 1976, be vacated, and that the determination of the appeal be held in abeyance pending the determination by the Supreme Court in United States v. Mandujano, 496 F.2d. 1050 (5th Cir. 1974), certiorari granted, 420 U.S. 989 (1975), which involved the issue whether the procedure here violates the Constitution.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

EDWARD R. KORMAN
Chief Assistant
United States Attorney
Of Counsel

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EDWARD R. KORMAN, being duly sworn, says that on the 30th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a PETITION FOR REHEARING OR REHEARING EN BANC of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Irving P. Seidman, Esq.
Rubin, Seidman & Dochter, Esqs.
425 Park Avenue
New York, New York 10022

Edward R Korman

Sworn to before me this
30th day of March, 1976.

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977